

1 Honor, we'll just renumber those 235 to 238.

2 JUDGE SIPPEL: That's fine. And
3 each one of the witnesses, you know, go
4 through the process with each witness.

5 They're familiar with the
6 information. They've signed. They've agreed,
7 etcetera, etcetera and then it will be
8 referred to as Exhibit 235 and findings and
9 order. All right?

10 MR. KIM: I think we're done, Your
11 Honor.

12 MR. TOLLIN: No, we have --

13 JUDGE SIPPEL: Thank you very
14 much, Mr. Kim.

15 MR. KIM: Not at all.

16 MR. TOLLIN: We have to address,
17 obviously, two exhibits that we agreed to
18 withdraw which is Exhibit 66 and Exhibit 67
19 for Comcast

20 JUDGE SIPPEL: Is it Comcast 66
21 and 67?

22 MR. TOLLIN: Yes. We've agreed

1 with counsel to withdraw 66 and 67.

2 JUDGE SIPPEL: Okay. I'll take
3 that as a request to withdraw and they're
4 ordered withdrawn.

5 (Whereupon, the above-referred to
6 documents were withdrawn.)
7 That's it?

8 MR. TOLLIN: That's it.

9 JUDGE SIPPEL: Where do we go from
10 here?

11 MR. FREDERICK: Your Honor, we
12 have consulted with Comcast and we would ask
13 the Court's permission to introduce the case
14 with short opening arguments of approximately
15 15 minutes or so to orient Your Honor to the
16 facts and issues in the case that we intend to
17 present during this week's evidentiary
18 presentations.

19 JUDGE SIPPEL: I welcome that.
20 It's -- I want to just be clear on the
21 mechanics here. What I accept, the documents
22 that have been withdrawn, excluded,

1 characterized by Mr. Kim, and to a lesser
2 extent by Mr. Tollin, all of these exhibits,
3 all of the exhibits that have been tendered in
4 this case are received in evidence for all
5 purposes, except those that I made a ruling
6 otherwise. In other words, we got some
7 documents that are going -- now are you
8 physically going to remove or have you
9 physically removed, for example, the pleadings
10 and the orders on the carriage complaint or
11 are they still in with the other documents?

12 MR. KIM: Yes, sir. We wanted to
13 get the ruling from Your Honor and then at the
14 next appropriate break, we'll just go through
15 the administerial process of getting all those
16 cleaned up by removing the ones physically
17 from the binders and replacing the few that we
18 have and we'll do that with Comcast counsel,
19 make sure that everyone is --

20 JUDGE SIPPPEL: Well, if they're
21 going to be -- I mean if I'm going to take
22 judicial notice of them or official notice, I

1 think there's a footnote that starts here some
2 place that -- normally, what I do is I have
3 judicially noticed documents put in a separate
4 binder and marked as exhibits. But since it's
5 already been done here, I don't see unless you
6 have a problem with Mr. Tollin, I don't see
7 any problem with leaving them in the binder,
8 but they would be marked.

9 MR. TOLLIN: I actually don't have
10 any problem with them being left in the binder
11 as long as we can then put in our pleadings.
12 Our pleadings, in other words, were not
13 encapsulated in the binder that you've got.
14 They were mainly MASN's pleadings.

15 JUDGE SIPPEL: Oh, I see. So you
16 want to supplement in effect?

17 MR. TOLLIN: So either we
18 supplement or we remove them. It doesn't
19 really matter to me.

20 JUDGE SIPPEL: Well, I'm going to
21 let you all figure that out. What you could
22 do is take them out as -- just leave the gap

1 in the exhibit numbers and you could take
2 whatever MASN has used, where you want
3 official notice of and take what Comcast wants
4 official notice of and put them all together
5 in one binder called the official notice
6 binder or something like that.

7 MR. TOLLIN: Excuse me for one
8 second. We actually have the material with us
9 today, so we could work that out with MASN.

10 MR. KIM: We have no objection.

11 MR. FREDERICK: We have no
12 objection.

13 JUDGE SIPPEL: Okay, so that would
14 work for both sides. Why don't we leave it
15 like that then and then you can tell us on the
16 record exactly this afternoon or tomorrow
17 morning, exactly what has been done. But
18 other than that -- the record is clear enough,
19 certainly by this point that everything but
20 those items that have been characterized in
21 some way as being unique or different or what
22 not, mostly in the context of -- the

1 categories really are withdrawn exhibits, and
 2 then secondly the official notice exhibits.
 3 Everything else is in evidence for whatever --
 4 newspapers, for whatever they're worth,
 5 everything else for the truth of the matters
 6 asserted. Except for the ones you said were
 7 in -- we know what we're talking about, I
 8 think. Okay.

9 (Whereupon, the above-referred to
 10 documents were marked as MASN Ex.
 11 1-6, 13-14, 19-71, 80-123, 125-
 12 217, 228-234, A-D; Comcast
 13 Exhibits 1-65, 68-87, and were
 14 received in evidence.)

15 So that really -- we're going to
 16 start with a witness in a few minutes.

17 MR. FREDERICK: Well, after
 18 opening arguments, Your Honor.

19 JUDGE SIPPEL: Do you want to make
 20 opening arguments right now and then take a
 21 break to get the witness ready? Is that okay?
 22 Or do you want to bring him right him?

1 MR. FREDERICK: Our first witness
2 is Mr. Cuddihy. He's right here in the
3 courtroom and with your permission, I don't
4 think Comcast has any objection to him hearing
5 the opening argument, unless you would prefer
6 that he be excused.

7 MR. TOLLIN: We have no objection.

8 JUDGE SIPPEL: But I'm saying do
9 you want to take a recess after your opening
10 arguments and then -- or do you want to bring
11 Mr. Cuddihy right on, either way?

12 MR. FREDERICK: Whatever Your
13 Honor --

14 JUDGE SIPPEL: If it's not
15 uncomfortable, I like to put him right on, but
16 -- the other little housekeeping thing is the
17 lunch break will be, like I say, about an hour
18 and a half.

19 Tomorrow, if all things are going
20 well, because of a commitment I have, which I
21 can adjust, I'd like to take a two-hour lunch
22 tomorrow which would be from about quarter of

1 12 to quarter of two.

2 Today, we'll go until -- since we
3 have the witness, we're all set to go. We'll
4 see what time Mr. Cuddihy finishes and we'll
5 take what is normally an hour and a half
6 break. See how everybody feels.

7 Mr. Cuddihy, the length of his
8 testimony, it looks like he might be on the
9 stand for cross examination for a bit,
10 expected, right?

11 I'm starting to learn how this
12 goes.

13 (Laughter.)

14 Okay. Anything else? On this
15 business about the open sessions, I've heard
16 no problem with that, thus far. You read my
17 order. You know how I like it handled. All
18 right.

19 For example, let me start off with
20 an illustration here. You've got this
21 confidentiality on your trial brief. I'm
22 talking to Mr. Frederick now. Do we have to

1 abide by that for the trial brief?

2 MR. FREDERICK: Your Honor, the
3 trial brief contains information that Comcast
4 marked as highly confidential. We respected
5 their designation of highly confidential in
6 the drafting of our brief.

7 We also have information that is
8 highly confidential which we have marked as
9 well. We have submitted redacted public
10 versions of our brief so that it's clear what
11 is being redacted as highly confidential, but
12 we did that in respect of the protective order
13 that you mentored after a consultation with
14 Comcast.

15 JUDGE SIPPEL: How does Comcast
16 feel about what's in the trial brief?

17 MR. TOLLIN: We want to respect
18 also MASN's confidentiality and the things
19 that we've designated confidential, I think
20 right now we're not prepared to on a wholesale
21 basis withdraw that request for
22 confidentiality. Maybe when we get to

1 individual items we can talk about it. Like,
2 for instance, I notice Exhibit 68. We could
3 get rid of the highly confidential designation
4 right now, if you'd like.

5 JUDGE SIPPEL: Whose exhibit?

6 MR. TOLLIN: That's our exhibit,
7 Comcast 68.

8 JUDGE SIPPEL: Comcast 68.

9 MR. TOLLIN: We could get rid of
10 the highly confidential designation as I've
11 just spoken.

12 JUDGE SIPPEL: All right, so when
13 you say highly confidential. It doesn't have
14 to be treated with any --

15 MR. TOLLIN: No confidentiality.
16 It's a channel line up that isn't confidential
17 at all.

18 JUDGE SIPPEL: Good. Okay.
19 Confidentiality withdrawn for Comcast Exhibit
20 68.

21 Okay, excellent. And when it goes
22 -- when dealing with the court reporter, if

1 you somehow would like to make a designation
2 to that, but even if you just manually just
3 cross it out and initial it. That will work.

4 MR. TOLLIN: Okay.

5 JUDGE SIPPEL: Okay. That's -- I
6 think that's it. I think that's it. Let me
7 just check my notes here. One more round and
8 then we'll go. I think that's it. Let's
9 start with opening arguments then. I guess it
10 will be Mr. Frederick, on behalf of MASN.

11 MR. FREDERICK: Thank you, Your
12 Honor.

13 JUDGE SIPPEL: Can I use that
14 phrase, MASN?

15 MR. FREDERICK: That's how it's
16 used colloquially. It's a trade name, Your
17 Honor, that TCR Sports Broadcasting Holding
18 registered in Maryland in the spring of 2005.

19 JUDGE SIPPEL: Thank you.

20 MR. FREDERICK: Your Honor, may it
21 please the Court, this case is about Comcast's
22 discrimination against MASN on the basis of

1 affiliation. It's undisputed that the core
2 programming of MASN, the Major League Baseball
3 games of the Baltimore Orioles and Washington
4 Nationals was highly sought after by Comcast.
5 In 2004, when the Commissioner of Major League
6 Baseball announced that the Montreal Expos
7 would be relocated to Washington and become
8 the Washington Nationals, Comcast sought
9 vigorously to obtain the telecast rights to
10 those games.

11 Internal projections by Comcast
12 showed that they valued those rights greatly.
13 They modeled ways that they would use those
14 telecast rights. And it was clear from the
15 documents submitted by Comcast that they
16 attached a very high value to obtaining the
17 telecast rights to the Washington Nationals.
18 And intended to telecast those rights
19 throughout the entirety of the Nationals
20 television territory.

21 The Baltimore Orioles were going
22 to be adversely affected by moving a team to

1 the Washington area. About a third of the
2 fans that are seeing games in Baltimore come
3 from the Washington area. And Baltimore
4 sought to obtain the rights in a pooled
5 arrangement with Major League Baseball which
6 at that time owned the Montreal Expos
7 franchise as it was being moved to Washington.
8 And it struck a settlement deal with Major
9 League Baseball that when the new owners of
10 the Nationals were identified, that the
11 Nationals and the Orioles would co-own an
12 independent, unaffiliated regional sports
13 network and that regional sports network would
14 be telecasting the games of both the Orioles
15 and the Nationals.

16 That occurred in late March of
17 2005. And in the very opening game of the new
18 Washington Nationals franchise, MASN was there
19 to telecast the game. The problem was Comcast
20 wasn't. And Comcast was unhappy about that.
21 Comcast is the dominant cable provider in the
22 Washington and Baltimore DMAs and it is the

1 dominant cable provider throughout MASN's
2 television territory.

3 And within a couple of weeks MASN
4 representatives went up to Philadelphia and
5 they asked to get an affiliate agreement so
6 that Comcast would distributed broadcasts of
7 these Washington Nationals games and Comcast
8 said no. And Comcast, in fact, retaliated
9 against MASN for obtaining the rights to
10 Nationals games and for announcing that it
11 intended to bring Orioles games under the MASN
12 programming brand. At that time, Comcast
13 SportsNet Mid-Atlantic, an affiliated
14 programming vendor of Comcast, owned the
15 telecast rights to the Baltimore Orioles
16 games, but that contract was going to expire
17 after the 2006 Major League Baseball season
18 ended.

19 So here we are in the spring of
20 2005, a new baseball team comes to Washington
21 and the Orioles are seeing their telecast
22 agreement with Comcast SportsNet Mid-Atlantic

1 about to expire in the next -- after the next
2 season. And it's clear publicly that they are
3 intending to pool those rights and have an
4 independent, unaffiliated regional sports
5 network serving the Mid-Atlantic region.

6 Comcast's reaction was
7 retaliation. They refused to carry the
8 Nationals games in the Baltimore and
9 Washington DMAs for nearly a year and a half.
10 Almost two complete baseball seasons of
11 Washington Nationals were lost because of
12 Comcast's retaliation. A week after the MASN
13 representatives went up to Philadelphia
14 seeking a distributing agreement, Comcast
15 SportsNet Mid-Atlantic filed suit in Maryland
16 State Court asserting a breach of contract and
17 in that lawsuit they represented publicly,
18 this is Comcast SportsNet Mid-Atlantic, that
19 they intended to distribute Orioles games
20 throughout their footprint where they had been
21 doing so before and that they sought the
22 Nationals rights for Comcast SportsNet and

1 that they intended to telecast the Nationals
2 rights throughout the entire telecast
3 territory.

4 They then sent letters to every
5 other distributor, pay television distributor
6 in this region, approximately 50 or so
7 letters, warning them of legal action if they
8 contracted with MASN to show the programming
9 of the Nationals games at that time.

10 So what happened here was this
11 classic situation where the vertically
12 integrated monopoly seeks the highly-sought
13 after programming, loses, and engages in
14 retaliation against the upstart, independent
15 unaffiliated programmer. And for
16 approximately 16 months MASN sought to get
17 Comcast to carry MASN's programming throughout
18 Comcast's footprint in the Mid-Atlantic.
19 Comcast said no.

20 Finally, in July of 2006, the
21 Federal Communications Commission issued the
22 Adelphia order and in the Adelphia order the

1 Commission identified the harms of vertically-
 2 integrated monopoly and pointed out that
 3 regional sports programming is must-have
 4 programming. And the reason why it's must-
 5 have programming, Your Honor, is because it's
 6 the only place where fans of a particular
 7 region can watch the games of that particular
 8 professional sports team. And the three
 9 sports teams that you'll be hearing about are
 10 professional baseball, professional
 11 basketball, and professional hockey.

12 The NFL has an entirely separate
 13 system of national rights that is not at issue
 14 in this case. What we're talking about here
 15 are regional sports programming where the
 16 leads create a television territory in some
 17 area around where the arena or stadium of that
 18 professional team is located and from that
 19 regional area, sports programming telecast
 20 rights are disseminated.

21 JUDGE SIPPEL: How about soccer?

22 MR. FREDERICK: Soccer is also

1 handled and negotiated for by regional sports
2 programming interests and there will be
3 testimony in this record, Your Honor, that
4 there was competition by Comcast Mid-Atlantic
5 and MASN over soccer rights and internal
6 documents that have been admitted into
7 evidence as exhibits indicating that Comcast
8 internally feared competition from MASN for
9 those very soccer rights.

10 JUDGE SIPPEL: That would be D.C.
11 United?

12 MR. FREDERICK: That's correct.
13 That's correct.

14 Now after the Adelphia order is
15 issued, the FCC announces that two things
16 would happen. One is that MASN which had
17 filed the carriage complaint, complaining of
18 the lack of carriage by Comcast and
19 discrimination on the basis of affiliation
20 would have an opportunity to choose whether
21 to proceed with its carriage complaint or to
22 go to arbitration under an independent

1 arbitrator who would be designated by the
2 parties and would make a recommended decision.

3 But Comcast -- sorry, but the FCC
4 only gave MASN ten days in which to make that
5 election. So immediately after the Adelphia
6 order, what the documents will show is that
7 Comcast officials wheeled into quick action.
8 They analyzed what kind of proposal they
9 wanted to make to MASN and MASN stood by
10 waiting to figure out is there going to be a
11 deal done with Comcast or not.

12 On the eighth day of the ten-day
13 window, Comcast finally notifies MASN and says
14 we're ready to talk and please send us the
15 latest redline version of the term sheet. On
16 the ninth day, they have -- the two parties
17 have their first substantive conversations
18 about resolving the conflict over the
19 complaint and in every term sheet that MASN
20 had sent to Comcast prior to that time, the
21 term "all Comcast systems would be launched"
22 was included in the contract.

1 On the ninth day, the Comcast
2 negotiators said to MASN we're not going to be
3 able to launch all systems. We have 150,000
4 approximately subscribers served by former
5 Adelphia systems in the Roanoke, Lynchburg,
6 Tri-Cities and other Virginia areas that we
7 don't know what the power of those systems is.
8 We can't watch those at this time. We promise
9 that we're going to upgrade those systems.
10 That's encapsulated in the FCC's Adelphia
11 order, but we can't commit to launching them
12 then.

13 So the MASN negotiators understood
14 that all of the systems within Comcast
15 territory would launch, except those that had
16 been specifically mentioned. And the
17 testimony that you'll hear, Your Honor, is
18 that the MASN negotiators who had to combine
19 more than 40 years of negotiating experience
20 had never had happen to them what happened to
21 them on the tenth day of the window that MASN
22 had to choose arbitration. And on that tenth

1 day, at 1:30 p.m. in the afternoon, Comcast
2 sent a schedule over to MASN and that schedule
3 said that these are the systems that would be
4 launched and they struck the term "all Comcast
5 systems" and imposed instead language that
6 said "at Comcast discretion."

7 So when MASN receives this, there
8 are only a few hours left before making the
9 arbitration election. It was uncertain
10 whether or not there was any way to get an
11 extension because it was the FCC that had
12 issued the order and there was a legal
13 uncertainty about the timing of obtaining the
14 extensions at that point. So the parties
15 barely had finalized the deal, signed the deal
16 for carriage of a substantial percentage of
17 the Comcast footprint with MASN's territory.

18 The problem was it wasn't all the
19 systems that Comcast had. In fact, they left
20 a very large number out and they left a large
21 number out that were not former Adelphia
22 systems and they in turn, ended up leaving out

1 a bunch of former Adelphia systems that had
2 the requisite power to launch MASN. And in
3 the spring of 2007, when MASN discovered that
4 there had been a large number left out, the
5 MASN folks went to Comcast and said you left
6 these out. We'd like them to be launched and
7 at that point Comcast's story started to
8 change.

9 First, Comcast said we had a
10 contract, abide by the contract. And MASN
11 pointed out well the contract says launch at
12 your discretion. We're asking you to launch
13 us. We never talked about these unlaunched
14 systems. What's going on here? And then
15 Comcast changed its story and said well, you
16 knew that the contract didn't allow for the
17 launches in these areas. The problem is they
18 didn't know either and the evidence will show
19 that their top negotiators never discussed
20 Harrisburg with MASN. They never discussed
21 Roanoke-Lynchburg with MASN except insofar as
22 these former Adelphia concerns. And in their

1 depositions, they deny that they even talked
2 about Roanoke-Lynchburg. And they never
3 talked about the Tri-Cities area of
4 Southwestern Virginia.

5 Now they've changed their story
6 again and it's a very subtle change, but in
7 their trial brief they changed the theory that
8 they had initially in their answer and now
9 they contend MASN should have known that these
10 unlaunched systems were not being launched.

11 But MASN's negotiators trusted
12 Comcast. This was a deal in which the
13 negotiators on both sides had had dealings
14 with each other before. They had a history in
15 the industry where it was common for MVPDs to
16 talk about which systems would be launched and
17 would not be launched. And it was simply
18 unthinkable to the MASN negotiators that
19 Comcast would omit systems from a list and
20 never talk about those systems with MASN at
21 all and never give any reason why these
22 systems are not being launched.

1 So now all of a sudden in the
2 spring of 2007 and following, Comcast creates
3 a number of pretextual justifications
4 purporting to rationalize their noncarriage
5 decision. They say, for instance, that the
6 lack of demand in these areas is triggering
7 the reason why they're not carrying. Well, we
8 will show evidence that disproves that there's
9 a lack of demand.

10 They argued that there was a lack
11 of bandwidth, technological capability of the
12 systems. We will prove that that is, in fact,
13 false. And that even in 2006, the systems
14 that are not launched, the vast bulk of them
15 had the requisite power to carry MASN.

16 The evidence is also going to show
17 that Comcast had an economic incentive and
18 motive to discriminate against MASN because it
19 has affiliated regional sports programming
20 interests in the same areas that compete
21 directly with MASN for viewers. They compete
22 for programming rights, like D.C. United, like

1 Washington Redskins pre-season games, like
2 Baltimore Ravens pre-season games. And
3 Comcast Mid-Atlantic feared that that was
4 competition that was going to occur.

5 The evidence is also going to show
6 that Comcast treats MASN differently than it
7 treats its own affiliated RSNs. Comcast gives
8 its own affiliated RSNs virtually complete
9 penetration in almost 100 percent of the
10 Comcast systems within the Comcast Mid-
11 Atlantic footprint and the Comcast
12 Philadelphia footprint, Comcast carries its
13 two affiliated RSNs.

14 For MASN though, MASN gets a big
15 haircut from Comcast and the percentages are
16 in the record, Your Honor, and in our pre-
17 trial brief. But for public purposes, I can
18 tell you that it is a substantial haircut and
19 it is a substantial number of subscribers well
20 into the six figures. Comcast [REDACTED]
21 [REDACTED],
22 [REDACTED] insists that MASN stick to the letter